THE HONGKONG AND SHANGHAI BANKING CORPORATION, JOHOR BAHRU

v.

MOHAMED FADZWI HAMIDUN & ORS

HIGH COURT MALAYA, JOHOR BAHRU
SYED AHMAD HELMY JC
[CIVIL APPEAL NO: 23-406-1986]
31 JULY 2001

CIVIL PROCEDURE: *Accounts - Filing of accounts - Allegation of plaintiff's failure to produce statements of accounts - Whether any effect on extent of liability of defendant as guarantor*

CIVIL PROCEDURE: *Pleadings - Statement of claim - Failure to disclose security of landed properties in statement of claim - Whether fatal to plaintiff's case - Whether amendment necessary - Whether response in the form of affidavit evidence sufficient*

The 5th defendant herein appealed against the decision of the senior assistant Registrar who allowed the plaintiff's application under O. 14 r. 1 of the Rules of the High Court 1980 against the 5th defendant in respect of some monies guaranteed under a guarantee executed by the 5th defendant. The 5th defendant appealed on the following grounds: (i) that the extent of liability against the 5th defendant as guarantor had not been established owing to the failure of the plaintiff to produce the relevant statement of accounts as against the principal debtor ('the company'); (ii) the plaintiff had failed to disclose in the statement of claim the provision of security in respect of some landed properties and the extent to which the security was realised.

Held:

[1] The company had two accounts, and the plaintiff had laid bare both the accounts, detailing the debit and credit movements therein as evidenced in encl. 60 *ie,* the plaintiff's affidavit in support of its earlier application for summary judgment. Further, the plaintiff had also established the amount outstanding, which was within the scope and amount guaranteed by the 5th defendant under the terms of the guarantee.
(pp 446 e, 447 i & 448 a)

[1a] Thus, the extent of the 5th defendant's liability had been conclusively determined through documentary evidence in the form of the accounts of the company and together with the 5th defendant's admission of the due execution of the guarantee and non-dispute of the 5th defendant's liability therein, this was a clear cut case befitting summary disposal.
(p 448 a-b)

[2] With regards to ground (ii) enumerated above, the plaintiff had given details of the securities and the amount realised. In such a situation, no useful purpose would have been achieved by amending the statement of claim. Response in the form of affidavit evidence was sufficient in the circumstances. (p 447 b-c)

[Appeal dismissed with costs.]

Case(s) referred to:
Bank of British Columbia v. Anglo American Cedar Products [1985] BCLR 350 ***(refd)***
Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd [1995] 3 CLJ 690 ***(refd)***
Cow v. Casey [1949] IKB 478 ***(refd)***
Esso Standard Malaya Berhad v. Southern Cross Airways (Malaysia) Berhad [1972] 2 MLJ 168 ***(refd)***
Gold Ores Reduction Co v. Parr [1892] 2 QB 14 ***(refd)***
Heng Cheng Swee v. Bangkok Bank Ltd [1976] 1 MLJ 267 ***(refd)***
Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd [1987] 2 MLJ 183 ***(refd)***
Ng Hee Thoong & Anor v. Public Bank Berhad [1995] 1 CLJ 609 ***(foll)***
Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Anor [1994] 4 CLJ 757 ***(refd)***
Syn Lee & Co v. Bank of China [1967] MLJ 87 ***(refd)***
UMBC v. Palm & Vegetable Oils (M) Sdn Bhd [1983] 1 MLJ 206 ***(dist)***
Voo Min En & Ors v. Leong Chung Fatt [1982] 2 MLJ 241 ***(refd)***
Wong Nget Thau & Anor v. Tay Choo Foo [1994] 4 CLJ 617 ***(refd)***

Legislation referred to:
Limitation Act 1953, s. 6
Rules of the High Court 1980, O. 14 r. 1. O. 56 r. 3A

For the plaintiff/respondent - Halmey Rapaee; M/s Shariff & Som
For the defendant/appellant - Sasindran Kuttapan; M/s Ho Thian Cheh & Co

Reported by Raja Vishnu Sivarajah

JUDGMENT

Syed Ahmad Helmy JC:
This is an appeal by the 5th defendant by way of encl. 25 against the decision of the senior assistant registrar given on 10 November 1987 in favour of the plaintiff, allowing the plaintiff's application in encl. 12 for final judgment under O. 14 r. 1 of the Rules of the High Court 1980 against the 5th defendant for the sum of RM385,000 together with the relevant interest and costs.

The appeal is formulated on two main grounds:

1. That the extent of liability against the 5th defendant as guarantor has not been established owing to the failure of the plaintiff to produce the relevant statement of accounts as against the principal debtor, Sukma Indah Sdn Bhd (hereinafter called the company).

2. The plaintiff has failed to disclose in the statement of claim the provision of security in respect of the 40 pieces of land and the extent to which the security was realised.

Four affidavits were filed in respect of the application for summary judgment - two in support of the plaintiffs application namely encls. 13 and 60 and two affidavits in opposition of the 5th defendant in encls. 16 and 40. The 5th defendant had earlier filed in a defence in encl. 6 raising the defences of past consideration and limitation under s. 6 of the Limitation Act.

At this stage I wish to highlight the undermentioned pertinent points in my observation of the statement of defence in encl. 6 and the further affidavit of the 5th defendant in encl. 40. Firstly it is my observation that there was no denial by the 5th defendant of his execution of the guarantee dated 10 October 1978. Secondly the question of the provision of security of the 40 pieces landed property was not pleaded in the defence though it was raised in the affidavits in opposition. Thirdly the defence of limitation was not pursued in the affidavits in opposition. Fourthly the affidavit in opposition in encl. 40 was filed in after the summary judgment was obtained which affidavit would under the amended r. 3A of O. 56 Rules of the High Court 1980 not be admissible unless leave is obtained. The 5th defendant has also not pursued nor raised any arguments in the appeal before me in relation to the question of no consideration and/or past consideration and limitation.

The 5th defendant's contention that the case does not befit summary disposal as deducible from the affidavit evidence filed herein is pivoted on the plaintiff's failure to disclose the provision of landed properties of the company as security and the amount and credit realised therefrom from a disposal of a portion thereof raises a triable issue as to the extent of the 5th defendant's liability under the guarantee.

Since the appeal at hand relates to applications under O. 14 Rules of the High Court 1980 it is only appropriate to re-emphasise the governing principles as distilled from decided cases.

Order 14 application is a summary judgment procedure and not a summary procedure - *Bank of British Columbia v. Anglo American Cedar Products* [1985] BCLR 350. Order 14 application is not a case of bringing the issues on affidavit evidence but is rather a question of deciding on affidavit evidence whether there is a moral improbability of a very high degree that the defendant can possibly succeed - *Syn Lee & Co v. Bank of China* [1967] MLJ 87.

Though it is trite law that a conflict of evidence ought not to be disposed off on affidavit evidence only, it is also trite law that the affidavit evidence must not be uncritically accepted. The affidavit evidence would have to be examined in detail to see "if there is a fact or reasonable probability of the defendant having a real or *bona fide* defence". The whole of the evidence has to be looked at, even if it involves minute examination of documents and facts, if by such exercise the court can come to a conclusion that there is no fair or reasonable probability of the defendant having a real or *bona fide* defence - *Wong Nget Thau & Anor v. Tay Choo Foo* [1994] 4 CLJ 617. Order 14 is intended to put an end to sham defences concocted for the sole purpose of delay and consequently causing great loss to the plaintiff who are endeavouring to enforce their rights under the law - *Segar Restu (M) Sdn Bhd v. Wong Kai Chuan & Ano*r [1994] 4 CLJ 757.

In short when an application is made for summary judgment under O. 14 supported by an affidavit which goes to show that there is no defence, the defendants must show why leave to defend must be given. This means that the defendants must provide answers on oath which constitute evidence that they have a defence fit to be tried - *Chen Heng Ping & Ors v. Intradagang Merchant Bankers (M) Bhd* [1995] 3 CLJ 690.

It is not enough for the respondent in answer to the appellants application to sign final judgment to raise an issue, or any issue. He must however raise such issue as would require a trial in order to determine it. In other words the issue raised must be an arguable issue. But where the issue raised is irrelevant and ineffective, or to use the words of Lord Greene MR in *Cow v. Casey* [1949] IKB 478, 481 "when the point is understood and the court is satisfied that it is really unarguable the appellants should be entitled to what they prayed for in the summons-in-chambers" - *Voo Min En & Ors v. Leong Chung Fatt* [1982] 2 MLJ 241.

An order under O. 14 should be made only if the court thinks it is a plain case and ought not to go to trial. If one simply has a short matter of construction with a few documents, the court, on summary application, should decide what in its judgment the true construction. There should be no reason to go formally to trial where no further facts could emerge which would throw any light upon the letters that have to be construed - *Esso Standard Malaya Berhad v. Southern Cross Airways (Malaysia) Berhad* [1972] 2 MLJ 168.

When the issue raised is solely a question of law pure and simple without reference to any facts or where the facts are clear and undisputed, the Court should exercise its duty under O. 14 - *Malayan Insurance (M) Sdn Bhd v. Asia Hotel Sdn Bhd* [1987] 2 MLJ 183.

Turning to the evidence as adduced by the various affidavits it is to be observed that the plaintiffs through their affidavit-in-reply in encl. 60 in reply to the 5th defendant's contention that the plaintiff failed to credit into the company's account the amount received from the properties charged, exhibited a detailed account of both the overdraft account as well as the loan account of the company - exhs. 1 to 24 para. 5 of encl. 60. The evidence as presented clearly shows that in respect of nine of the properties charged, a sum of RM83,396 was credited to the company's account for the period 29 August 1979 to 18 December 1979 and a further sum of RM14,832 was credited on 13 July 1987.

In relation to the 5th defendants averment of the sum of RM135,000 paid by UDA under the corporate guarantee not being credited and deducted the plaintiff has again rebutted same by detailing in para. 6 of encl. 60 that not only was the corporate guarantee executed by UDA separate from that executed by the 5th defendant but due credit was given to the company upon receipt of UDA's payment in April 1983 (which is way before the writ and the application for summary judgment was proceeded upon) thereby reducing its overdraft account and hence establishing the amount outstanding which is covered by the 5th defendant's guarantee for the sum of RM385,000.

From the evidence aforesaid it is clear that the company has two accounts - namely the overdraft account and the loan account and the plaintiff has laid bare both the accounts, detailing the debit and credit movements therein. It is interesting to note that the 5th defendant not only did not reply to the averments in respect of the accounts made in encl. 60 but he did not at any time allege that the accounts were inaccurate.

Thus on the authority of *Ng Hee Thoong & Anor v. Public Bank Berhad* [1995] 1 CLJ 609 he is deemed to have admitted the averments made and cannot now challenge same. Furthermore the 5th defendant cannot claim to be oblivious to the company's accounts bearing in mind that he is a director of the company and it is trite law that as director he is deemed to have knowledge of same.

On the 5th defendant's contention and reliance on the authority of *UMBC v. Palm & Vegetable Oils (M) Sdn Bhd* [1983] 1 MLJ 206 that failure to disclose the security of the landed properties in the statement of claim is fatal and that the affidavit evidence cannot make good such defect or omission, it should be observed that the principle was adopted from the English case of *Gold Ores Reduction Co v. Parr* [1892] 2 QB 14 which rationalised the reason that a defendant should know what the exact claim against him from the writ itself.

It should also be observed that in *UMBC*'s case the issue of the securities was expressly raised by the defendant in their amended defence, which is unlike the factual situation herein where no such issues was pleaded by the defendant and no attempts made to plead same by way of amended defence and hence it is distinguishable.

The question relating to the securities was raised by the 5th defendant in his affidavit in support of his contention that the disclosure thereof and the amount realised from the redemption would have a bearing on the extent of his liability under the guarantee and in response thereof the plaintiff gave details of the securities and amount realised. In such a situation no useful purpose would be achieved by amending the statement of claim and response in the form of affidavit evidence is sufficient in the circumstances. Failing to respond in the manner it did would invariably expose the plaintiffs to the adverse effects of the *Ng Hee Thoong*'s principle. The nature of the claim against the 5th defendant herein is in the capacity of a guarantor based on a letter of guarantee the terms and the execution whereof was never challenged. Hence the effect and the extent of the guarantee would depend primarily upon its expressed terms. In *Heng Cheng Swee v. Bangkok Bank Ltd* [1976] 1 MLJ 267 his Lordship Lee Hun Hoe (CJ Borneo as he then was) at p. 274 stated:

> A guarantee is not a contract *uberimae fidei* and, therefore, there is no obligation on the part of the plaintiff to disclose to the defendant all material facts known to the plaintiff. A contract of guarantee, like all other contracts depends primarily upon its expressed terms and the respective rights of the parties must be gathered from the guarantee form used in a particular case.

Since the 5th defendant's liability and the extent thereof under the guarantee is expressly spelt out as "not exceeding the aggregate sum of RM385,000 together with interest thereon at the rate of 10 1/2 percent per annum" and there is overwhelming unrebutted affidavit evidence by the plaintiffs regarding the state of the accounts between the plaintiffs and the company and the limitation of their claim within the specified limit of the guarantee, no triable issue can arise.

Upon a careful analysis of the available evidence herein and applying the principles applicable in O. 14 applications, it is my considered view that this case merits the exercise of the court's discretion in favour of the plaintiffs as not only has the 5th defendant no valid defence but also there is no other reason for the court to place the matter for full trial. The facts clearly justifies my decision that there is absolutely no purpose for the matter to proceed to trial as the 5th defendant has failed to raised any *bona fide* issues to be tried. The plaintiff has not only furnished details of the accounts of the company but has also established beyond doubt the amount outstanding, which amount

outstanding is within the scope and amount guaranteed by the 5th defendant under the terms of the guarantee. The extent of his liability has been conclusively determined through the documentary evidence in the form of the accounts of the company and together with the 5th defendant's admission of the due execution of the guarantee and non-dispute of his liability therein is a clear cut case befitting summary disposal.

I accordingly upheld the senior assistant registrar's decision given on 10 November 1987 and the 5th defendant's appeal in encl. 25 is accordingly dismissed with costs.